U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HELEN E. ZANATTA and DEPARTMENT OF THE AIR FORCE, HICKAM AIR FORCE BASE, HI

Docket No. 00-1361; Submitted on the Record;
Issued April 3, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
DAVID S. GERSON

The issues are: (1) whether appellant's condition causally related to her February 7 and August 29, 1988 employment injuries resolved by September 7, 1995; and (2) whether appellant sustained a recurrence of disability from January 18 to February 12, 1996 causally related to her employment injuries.

The Office of Workers' Compensation Programs accepted that appellant's February 7, 1988 injury incurred in a fall during a skating social while she was on travel status, resulted in a right hamstring strain. The Office accepted that appellant's August 29, 1988 injury incurred when she slipped in a hallway resulted in multiple subluxations and a post-traumatic lumbar disc syndrome.

Appellant returned to her regular work as a personnel management specialist on March 13, 1989. Following an accepted recurrence of disability beginning January 7, 1991, appellant returned to work four hours a day on June 25, 1991 and to full-time limited duty on April 20, 1992. Following another accepted recurrence of disability beginning February 6, 1995, appellant returned to full-time limited duty on August 10, 1995.

In the interim, the Office referred appellant, prior medical reports and a statement of accepted facts to Dr. Wayne H. Gordon, a Board-certified neurologist, for a second opinion on her condition and its relationship to her employment injuries. In a report dated May 3, 1995, Dr. Gordon set forth appellant's history and reviewed the findings on prior medical reports. After describing appellant's findings on physical examination, Dr. Gordon diagnosed "a preexisting lumbar stenosis which is documented by CT [computerized tomography] scans," "a previous hamstring rupture on the right which is healed" and "a myofascial pain syndrome involving her back and legs without evidence of a current acute lumbar radiculopathy." Dr. Gordon concluded that appellant's current lumbar strain syndrome was directly related to her employment injuries, that her current disability would not prevent her from performing her light-duty position and that he did not anticipate appellant achieving full recovery because of her chronic myofascial pain syndrome and preexisting lumbar stenosis. By letter dated July 26,

1995, the Office requested that Dr. Gordon submit a supplemental report addressing whether appellant had any demonstrable disability due to the only accepted condition of lumbar strain or whether her current disability stemmed from her preexisting congenital lumbar stenosis. In a report dated August 1, 1995, Dr. Gordon stated: "I would find no demonstrable disability from work due to appellant's accepted work-related condition based on lumbar strain only. Her preexisting lumbar stenosis and her apparent development of a chronic myofascial pain syndrome is causing her current disability."

The Office determined that the reports of Dr. Gordon created a conflict of medical opinion with the reports of appellant's attending Board-certified neurologist, Dr. Michael D. Merren. In a report dated March 30, 1995, he stated that appellant "has an underlying condition of lumbar stenosis, which is probably a combination of congenital stenosis giving her a small spinal canal and some acquired stenosis due to a lumbar spondylosis. These conditions can remain asymptomatic for many years, but once patients injure their back they can develop several symptom complexes from these." Dr. Merren stated that appellant had developed a "lumbar strain which is a muscular pain in the low back area that can be so severe that she is unable to move her back more than 10 or 15 degrees in any direction and can be painful enough that she is unable to function" and, as another manifestation of her lumbar stenosis, "a lumbar radiculopathy and that is what we have been dealing with for the last several exacerbations. For your information, exacerbation does not mean that symptoms completely disappeared, but that they worsened from some lower level of difficulty to a more severe level of difficulty which can include physical symptoms and pain, both of which have been present in [appellant]." Dr. Merren then stated:

> "[Appellant] has never been completely free of any symptoms. She has worked hard to keep her symptoms under control by doing daily exercises, avoiding pushing, pulling and lifting, using special furniture in her office setting and often tolerating some pain and still continuing to work. At other times her symptoms have markedly worsened to the point that I would not allow her to return to work for fear that she would injure herself further. We are in one of those periods of time now. The fact that she had underlying lumbar stenosis without any symptoms should not detract from the fact that all of her symptoms arose out of the original two accidents and have been accepted as work-related injuries in the past."
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> "I hope I have made the case solid enough for you to understand that we are dealing with a continuum of medical problems, all arising out of one injury with some of the manifestations of the injury being more apparent initially (the muscle tear in the leg) and the others being more apparent a number of months later (the lumbar stenosis with strain and radiculopathy)."

To resolve the conflict of medical opinion, the Office referred appellant, the case record and a statement of accepted facts to Dr. Morris H. Lampert, a Board-certified neurologist. In a

report dated September 7, 1995, he set forth appellant's history and reviewed prior medical reports. After describing appellant's findings on physical examination, he stated:

"The clinical picture is characterized by the following:

"1. Trauma to the lumbar/lumbosacral spine manifest by:

a Lumbar/lumbosacral neuromyofascial ligament injury. This is a soft tissue injury with involvement of muscles, ligaments and supportive tissue, probably subsided.

b. Probable traumatic L5 radiculopathy on the right, subsided. The initial EMG [electromyogram] on 5 October 1988 revealed mild right L5 root involvement. A subsequent EMG on 20 June 1991 (Dr. Michael Merren) revealed no evidence of radiculopathy.

"2. Trauma to the right hamstring with possible tear, no longer present.

"3. Underlying lumbar and lumbosacral pathology:

a. Lumbar spondylosis.

b. Mild spinal stenosis.

"4. Psychophysiologic neuromuscular and musculoskeletal system reaction with neuromyofascial syndrome.

"5. Superimposed functional or emotional factors are present. These factors are of moderate degree and are disabling in nature."

Dr. Lampert noted that there was no clinical evidence of arachnoiditis, but as a recent magnetic resonance imaging (MRI) suggested arachnoiditis, he recommended repeat MRI with and without contrast to exclude arachnoiditis and also recommended psychiatric and psychologic evaluations and supportive care. Dr. Lampert concluded: "There is no evidence of a neurologic deficit other than mild lumbar stenosis and spondylosis. There is no objective evidence of significant lumbar/lumbosacral pathology. Degenerative disc disease *per se* produces no symptoms." Dr. Lampert stated that appellant was "capable of light work but should avoid pushing, pulling or lifting weight more than 25 to 30 pounds. She should avoid positions of sustained forward flexion and repetitive jolting."

In response to an Office request for a further opinion on the objective or clinical findings supportive of the first three conditions he diagnosed, Dr. Lampert stated in a February 7, 1996 report:

"Indeed at this time, there is no objective evidence to confirm any sequela from the original injury to the lumbar/lumbosacral spine with soft tissue component and L5 root involvement. This is equally true of the injury to the right hamstring muscles with possible tear. The condition is no longer present. What is currently

present is underlying lumbar/lumbosacral pathology (lumbar spondylosis and mild spinal stenosis predates the current injury). If the original symptoms were present for a minimum of six months then the condition would qualify for an impairment rating. Otherwise there is no deficit whatsoever with respect to the original accident."

On February 14, 1996 appellant filed a claim for a recurrence of disability from January 18 to February 12, 1996 due to her employment injuries. In a report dated January 19, 1996, Dr. Merren stated that appellant had had an episode of intense back and right leg pain lasting three days that "came on when she was reaching for the door going into the dentist's office. She had done nothing else to aggravate her back at that time." Dr. Merren described appellant's findings on examination, diagnosed "recurrent lumbar strain with lumbar radiculopathy and arachnoiditis," prescribed medication and physical therapy and recommended that she not return to work until he saw her again in 10 days. In a report dated February 5, 1996, Dr. Merren stated that appellant was improved and that she "asked to return to work, but I do not want her to do so until she has completed all of her therapy." In a report dated February 15, 1996, Dr. Merren stated: "Appellant] had a recurrence of her previous disability related to the above-mentioned claim number necessitating her being off work from January 18 to February 12, 1996 for treatment. I consider this a recurrence of the previous injury."

By decision dated March 18, 1996, the Office found that the weight of the medical evidence, represented by the reports of the impartial medical specialist Dr. Lampert established that appellant's work-related conditions had ceased. The Office also found that appellant had not submitted evidence sufficient to demonstrate that the claimed recurrence of disability from January 17 to February 12, 1996 was causally related to her employment injuries.

Appellant requested a hearing and submitted additional medical evidence. In a March 22, 1996 report Dr. Merren stated that appellant's "arachnoiditis arose out of treatments for the lumbar stenosis, possibly the epidural steroid injections and/or the myelogram may have contributed to it. It is considered part of the injury because it is a complication of diagnosis and treatment." Dr. Merren also stated:

"[Appellant] has had a number of exacerbations of her lumbar strain; the last one being in January this year and it required her to be off work and to take medication under my care. This exacerbation is directly related to the above mentioned injuries and is not a new injury. [Appellant] has never completely resolved the original injuries, but has returned to work under some strict work conditions.

"It seems ridiculous that each time an exacerbation of this injury is reported that someone decides it is a new injury."

In a report dated January 19, 1997, Dr. Brad B. Hall, a Board-certified orthopedic surgeon, stated that, assuming appellant's history of no back problems before her 1988 injury was correct, "it is medically probable that, that injury was the cause of your condition that continues to give you problems." He also stated:

> "The injury to your back may have aggravated a preexisting condition. We do not know the severity of any preexisting condition prior to the injury. There is no way of determining how much of the current findings of spondylosis, etc., are related to preexisting condition or what has developed since the injury. It is usually the case that people with chronic back problems have symptoms that wax and wane, meaning they are better at times and worse at times. People with this type of problem do not have to have a new injury prior to each exacerbation of their symptoms. This is a well-established natural history of chronic back problems."

By decision dated April 9, 1997, an Office hearing representative found that the case was not in posture for a decision, as further development of the evidence was necessary. The case was remanded to the Office for the MRI with contrast and the psychiatric and psychologic evaluation recommended by Dr. Lampert. The Office was also directed to have Dr. Lampert review and comment on a July 24, 1995 MRI showing severe arachnoiditis, provide an opinion of whether appellant developed a myofascial pain disorder and provide a second opinion of whether she sustained a recurrence of disability from January 17 to February 12, 1996 as a result of her accepted conditions.

On January 27, 1998 the Office referred appellant, prior medical reports and a statement of accepted facts to Dr. David Gunzburger, Ph.D., a psychologist. In a report dated February 3, 1998, he diagnosed a mixed personality disorder and concluded:

> "It is the evaluator's impression that a significant psychopathology is present, however, it is further the opinion of the evaluator that this psychopathology is of long standing and is deeply ingrained, resistant to change and at worst only mildly exacerbated by the [appellant's] reported injuries. It appears more likely that the injuries and subsequent pain provided at the time a vehicle for focus of the pathology. Injury and pain is not, however, held as causal.
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> "Further, the emotional condition identified is not of a type nor of a severity which would cause the claimant to be disabled."

In a report dated December 2, 1998, Dr. Lampert stated that there was "no evidence arachnoiditis is present and, if there were, there is no evidence it could be related to the injury of 29 August 1988. That type of slip and fall cannot produce arachnoiditis. There would have to be extensive bleeding." Dr. Lampert also stated that myofascial pain syndrome involving the back and legs was essentially a soft tissue injury that was never permanent, that appellant had no disability as of January 17, 1996, as she had no evidence of any neurologic deficit or objective evidence of significant lumbar or lumbosacral pathology when he saw her on September 7, 1995. Dr. Lampert concluded that appellant had disabling emotional factors, but "no physical disabling condition."

By decision dated February 2, 1999, the Office found that the evidence failed to demonstrate appellant's recurrence of disability from January 17 to February 12 1996 was causally related to her employment injuries and that the weight of the medical evidence established that appellant's work-related conditions ceased by September 7, 1995.

By letter dated March 18, 1999, appellant requested reconsideration; contending that the July 24, 1995 MRI and the evidence regarding her recurrence of disability were not reviewed by Dr. Lampert. On July 13, 1999 the Office transmitted a copy of the July 24, 1995 MRI report to him and asked if this changed his December 2, 1998 opinion. In a report dated August 2, 1999, Dr. Lampert stated that the etiology of the severe arachnoiditis with marked clumping of the nerve roots reported on this MRI was undetermined and that the MRI must be repeated with and without contrast in order to better delineate scar tissue.

In a report dated March 9, 1999, Dr. Merren stated that appellant had developed arachnoiditis which was "in keeping with her radiculopathic symptoms" and that the arachnoiditis "may relate to some of the epidural steroid injections that have been given in the past, but often this occurs without any obvious etiology." Dr. Merren further stated that appellant may have had spinal stenosis before her first 1988 injury "but she had no symptoms from this and her symptoms have all arisen either from the injury or from complications of treatment for the injury, which is where I would put the arachnoiditis. All of the problems for which I have been treating [appellant] have arisen out of her work injury from 1988 (both injuries)…." In a report dated July 23, 1999, Dr. Merren stated that appellant "has radiculopathy which is an irritation of the lumbar nerves related to arachnoiditis, which is a scarring of the lumbar subarachnoid space that is untreatable either by medication or operation and will persist indefinitely," that she had had a worsening of her symptoms since March 1999 and that he had "been unable to bring her back to the condition where she could attempt to try to work because of the arachnoiditis and lumbar radiculopathy and I may expect this is going to worsen in the future as that is the natural progression of arachnoiditis."

In a report dated September 16, 1999, Dr. Lampert updated appellant's history and described her findings on examination on that date, stating that she had no weakness of any muscle group, but exhibited striking histrionic motor response in the right leg, with giveaway weakness that was also noted on his September 7, 1995 examination. In a report dated September 29, 1999, Dr. Lampert noted that an MRI of appellant's lumbar spine with and without contrast was performed on September 27, 1999, listed the findings and impression reported by the radiologist who performed this test and commented:

> "Without pathologic enhancement by contrast, one cannot posit arachnoiditis. Only 'clumping' or 'lateralization' of nerve roots in the thecal sac at L4-5 is seen with focal or patchy arachnoiditis. The lack of pathologic enhancement makes the presence of such a pathologic state of adhesions or scarring improbable. The presence of focal adhesive arachnoiditis is at variance with the clinical picture. Considerable pain may be experienced with a tear of the hamstrings, especially if it is an incomplete tear or a rupture. Superimposed emotional factors in conjunction with the lumbar fixation would easily produce a chronic neuromyofascial pain syndrome.

"I will attempt to obtain the recent MRI for personal review."

By decision dated October 7, 1999, the Office found that the reports of Dr. Lampert represented the weight of the medical evidence and that the additional evidence was not sufficient to warrant modification of the Office's February 2, 1999 decision.

The Board finds that appellant has not established that she sustained a recurrence of disability from January 18 to February 12, 1996 causally related to her employment injuries.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[1]

Appellant's attending physician, Dr. Merren, stated that appellant had "a recurrence of her previous disability … necessitating her being off from work from January 18 to February 12, 1996 for treatment" and that she had an exacerbation in January 1996 directly related to her employment injuries. His reports, however, do not show a change in the nature and extent of the injury-related condition. Dr. Merren's findings on examination on January 19, 1996, the day after she stopped work, show better reflexes and straight leg raising than his findings on September 26, 1995,[2] when appellant was working full time. Appellant complained of greater pain on January 19, 1996, but this alone does not show a change in her injury-related condition.

The Board finds that the case is not in posture for a decision on the issue of whether appellant's condition causally related to her February 7 and August 29, 1988 employment injuries resolved by September 7, 1995.

There was a conflict of medical opinion regarding whether appellant continued to be disabled by residuals of her 1988 employment injuries. Dr. Gordon to whom the Office referred appellant concluded in a May 3, 1995 report that appellant was no longer disabled due to an employment-related condition. Her attending Board-certified neurologist, Dr. Merren, has consistently maintained that appellant continues to be disabled by residuals of her employment injuries. To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Federal Employees' Compensation Act,[3] referred appellant, the case record and a statement of accepted facts to Dr. Lampert, a Board-certified neurologist.

[1] *Terry R. Hedman*, 38 ECAB 222 (1986).

[2] This is the most recent prior examination by Dr. Merren contained in the case record.

[3] 5 U.S.C. § 8123(a) states in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

In a report dated September 7, 1995, Dr. Lampert explained why he concluded that appellant's radiculopathy, the condition Dr. Merren stated was responsible for appellant's exacerbations, had subsided, noting that an October 5, 1988 EMG showed radiculopathy and that a June 20, 1991 EMG showed no evidence of radiculopathy. Dr. Lampert also concluded that appellant's hamstring strain with possible tear was no longer present and there is no medical evidence that she had residuals of her hamstring injury after September 7, 1995. He also stated that there was "no evidence of a neurologic deficit other than mild lumbar stenosis and spondylosis," which are preexisting conditions. In a report dated February 7, 1996, Dr. Lampert found "no objective evidence to confirm any sequela from the original injury" and "no deficit whatsoever with respect to the original accident."

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[4] The reports of Dr. Lampert meet these criterias and constitute the weight of the medical evidence regarding appellant's hamstring strain, subluxations and post-traumatic lumbar disc syndrome, the conditions accepted by the Office.

There remains, however, a conflict of medical opinion on whether appellant has arachnoiditis as a result of treatment for her 1988 employment injuries. In a report dated March 22, 1996, Dr. Merren stated that appellant's "arachnoiditis arose out of treatments for the lumbar stenosis, possibly the epidural steroid injections and/or the myelogram may have contributed to it." In an August 9, 1995 report, Dr. Hall, a Board-certified orthopedic surgeon, also concluded that appellant had severe arachnoiditis.

The existence and causal relation of arachnoiditis was not an issue on which there was a conflict of medical opinion at the time of the Office's referral to Dr. Lampert. In his September 7, 1995 report he stated that there was no clinical evidence of arachnoiditis and recommended a repeat MRI to exclude this condition. The MRI with and without contrast recommended by Dr. Lampert was finally performed on September 27, 1999 and he concluded that neither this MRI nor appellant's clinical picture supported "a pathologic state of adhesions or scarring."

To resolve this conflict of medical opinion, the Office should refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for a reasoned medical opinion of whether appellant has arachnoiditis and, if so, whether it is disabling and causally related to treatment she received for her 1988 employment injuries.[5] The Office should then issue an appropriate decision on this issue.

[4] *James P. Roberts*, 31 ECAB 1010 (1980).

[5] If treatment is performed as a result of an employment injury and it causes further impairment, this would constitute a consequential injury and is compensable. *Gaare R. Davis*, 48 ECAB 612 (1997).

The October 7, 1999 decision of the Office of Workers' Compensation Programs is affirmed insofar as it determined that appellant did not establish that she sustained a recurrence of disability from January 18 to February 12, 1996 causally related to her employment injuries. Insofar as the October 7, 1999 decision determined that appellant had no residuals of her February 7 and August 28, 1988 employment injuries, the decision is set aside and the case remanded to the Office for action consistent with this decision of the Board.

Dated, Washington, DC
April 3, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

David S. Gerson
Alternate Member